No. 12,706

IN THE

United States Court of Appeals

For the Ninth Circuit

JOSHUA HENDY CORPORATION (a Corporation), sued herein as Pacific Tankers, Inc. (a Corporation),

Appellant,

vs.

OTTO GEORGE CLAVEL,

Appellee.

BRIEF FOR APPELLEE.

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Subject Index

Table of Authorities Cited

Cases

Codes

Texts

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APPELLANT'S ASSIGNMENTS OF ERROR ARE INSUFFICIENT TO RAISE ANY ISSUE.

At the outset Appellee desires to point out that Appellant's purported assignments of error are legally insufficient to raise any issue for review, and that the appeal should be dismissed on that ground. The assignments of error are set forth on pages 160 and 161 of the transcript, and for convenience are printed below.

> "I. The District Court erred in entering a decree in favor of libelant and appellee and

against respondent and appellant on his cause of libel.

II. The District Court erred in entering a decree denying respondent and appellant a decree against libelant and appellee.

III. The District Court erred in making and entering conclusions of law and order for decree made and entered in the above-entitled cause.

IV. The decree herein in favor of libelant and appellee and against respondent and appellant is against the law.

V. The District Court erred in failing to adopt the proposed findings of fact and conclusions of law offered by respondent and appellant, which are in accordance with the evidence and the law applicable to the case.

VI. The District Court erred in not rendering a decree in favor of respondent and appellant and against libelant and appellee."

Rule 35 of this Court provides that appellant shall file with the Clerk of the Court below with his petition for appeal an assignment of errors, numbering each, and shall set out *separately and particularly* each error asserted and intended to be urged.

Under a similar rule it has been held that an assignment that the Court erred in entering a decree sustaining the libel is not a sufficient assignment of error. *The Blakeley,* 285 Fed. 348.

In *The Connact,* 299 Fed. 229, it was held that an assignment that the trial Court erred in entering a

decree against the appellant was too general to merit consideration or to present anything for review.

And see *Cook v. Smith,* 187 F. 538, holding that the review of a decree in admiralty is limited by the assignments of error; *The Golden Gate,* 52 F. (2d) 397, holding that a defense not raised in the answer, nor argued below, nor assigned as error will be ignored; *In re Lee Transit Corp.,* 37 F. (2d) 67, holding that a finding is conclusive on an appellee who fails to file assignments of error.

None of the purported assignments of error are sufficient to raise any issue on this appeal. They are mere conclusions of the pleader, and the appeal should be dismissed on this ground.

FACTS OF THE CASE.

The facts of this case are adequately and accurately set forth in the Findings of Fact made by the District Court, printed in the Transcript of Record, beginning at page 15. All findings are supported by a great preponderance of the evidence, and most by undisputed evidence.

On April 23, 1948, while the tanker Pecos was approaching Singapore, on her voyage from Bahrein Island to Yokosuka, the libelant, boatswain on the vessel, scratched the index finger of his right hand. He cleaned the wound and applied band-aids. On the following day the injured finger was swollen and

painful and showed evidence of infection. He informed the Mate of the vessel, who permitted him to knock off work and instructed libelant to come to him for medical care if the finger did not improve.

On April 25, 1948, the finger was swollen and painful and the swelling extended into libelant's right hand. As time passed the swelling extended into the right forearm, and the hand became discolored, turning blue, green and yellow, and libelant had a fever. The libelant reported to the Master of the vessel for medical care on April 25, 1948. He asked the Master to give him penicillin and was told that there was none; he asked to be put ashore for hospitalization in Manila, and the Master replied that that was not necessary. He then requested the Master to radio for medical advice, and was informed that that was not necessary.

The Mate gave libelant Epsom Salts and directed him to soak his hand in a hot solution, and later applied a "drawing salve" and a "healing powder" to the wound. On April 27, 1948, the Mate made an incision in libelant's index finger for the purpose of removing pus, and later removed pus from the back of libelant's hand. On the day the incision was made the vessel was less than one day's run from Manila. The finger was swollen to twice its size, and the hand was discolored and swollen and the swelling extended into the forearm. The index finger developed a "crook" until it became permanently bent at a right angle to the hand.

The vessel arrived at Yokosuka on the afternoon of May 3, 1948, but libelant was not hospitalized until May 4, although he asked for immediate hospitalization. At the hospital in Yokosuka he was given a course of penicillin treatments, together with sulfa drugs. The doctor in attendance wished to amputate the entire index finger down into the hand, but libelant would not consent, and after about four days' treatment libelant was permitted to return to the "Pecos." On the return voyage he asked for penicillin treatments but they were not afforded him. On return to the United States libelant reported to the Marine Hospital in San Francisco. He was an inpatient for 21 days, and among other things received penicillin treatments. About the middle of September, 1948, a portion of the right index finger was amputated. Libelant was unable to return to work until February, 1949. The stump of the finger is still sensitive and painful, and the motion of the middle finger is limited and grip of the right hand permanently reduced 35%.

STATEMENT OF ISSUES ON APPEAL.

We have already pointed out that the assignments of errors filed in the District Court are insufficient to raise any issue on appeal. Appellant, in filing its Statement of Points in this Court merely adopted the assignments of errors "heretofore filed." (Tr. p. 163.)

In Appellant's brief, under the heading "Statement of Case" (page 3) Appellant states the question involved as follows:

"Must a vessel *always* deviate to obtain medical treatment for a *minor* injury to a seaman's finger, where such deviation in the conscientious and best judgment of the Master is unnecessary."

That, of course, is an unfair and inaccurate statement of the question involved, if it be assumed that there is any question at all. In the first place, the injury was not a minor one. Secondly, it is not a question of whether a vessel must always deviate, but whether deviation was necessary under the facts of this case. Thirdly, the question assumes that the Captain acted conscientiously, and the trial Court found otherwise.

Still more important is that Appellant raises a question only as to whether the ship *should have deviated* to Manila to obtain medical treatment, whereas the trial Court based its decree on the general failure of the appellant to provide Appellee with proper and adequate medical care, as well as on the inadequacy of the medicine chest, the failure to replenish same at ports of call, or by contacting other vessels, and the failure to avail itself of medical advice by means of radio. The failure to put libelant ashore at Manila was only *one ground* of negligence found, and Appellant has limited its appeal to that ground. Since only one finding of negligence is attacked, the decree should be affirmed.

The question which should have been posed is whether there was any evidence sufficient to sustain any of the findings of negligence found by the trial Court, and Appellant should have undertaken to overcome the presumption in favor of those findings. This Appellant has not done and could not do.

THE INJURY WAS SERIOUS, AND THE URGENCY OF PROPER TREATMENT WAS KNOWN.

Appellant argues that, despite libelant's urgent requests for expert medical attention, the master of the vessel was not negligent in disregarding libelant's pleas and taking him on to Yokosuka. It is stated that Clavel's hand and finger never at any time showed evidence of blood poisoning, and that the master did not consider the condition serious. (Brief p. 15.) It is argued: (Brief p. 16) that "the injury sustained by appellee was, to all outward appearances, a minor one and was not serious by any nature or stretch of the imagination." "The injury was a minor one, which, in the exercise of reasonable judgment on the part of the captain was not sufficient to cause a diversion or to radio for medical advice as the captain had the matter of treatment well in hand."

But let us look at the facts:

Clavel testified that on April 26th "the hand was discolored and the arm started to swell up." (Tr. p. 38.) On April 27th "the finger was swollen up to twice its size. The hand was altogether swollen and

the whole arm was swollen. That is when the Mate decided to cut the finger." (Tr. p. 39.) "The hand had started to get all red, green and blue." (Tr. p. 75.) There was pus in the hand (Tr. p. 40) and the finger was stiff and bent at a right angle. (Tr. p. 41.) "The whole hand had swole up and puffy." (Tr. p. 76.)

The deposition of the Mate was taken by respondent, and he corroborates Clavel's statement. When Clavel first came to him the finger was "swollen and started to get discolored with red around it." (Dep. p. 20.) "The reason I started the drawing salve was because his *arm* started to look to me like it might be swelling." "I lanced it. That took the swelling out of his arm and got rid of all that pus out of his hand, on the back of his hand. *His hand had started to turn green and yellow* on here * * *" (Dep. p. 23.) "I went back to that epsom salts solution afterwards, because I wasn't sure myself when the wound was open—I didn't know whether that ointment might cause some more poisoning in there."

The ship's report of illness, dictated by the Captain, contains the notations: "Finger swollen to twice normal size—patient running a fever." "Badly infected finger." (Lib. Ex. B-2, p. 23.)

The foregoing facts were outlined to two doctors who testified at the trial. Dr. Mensor testified for respondent (Tr. p. 94):

> "I would think, if a man had all those things, we might even anticipate gangrene. I would say it was a serious condition.

Q. It would be a condition that you as a doctor would not think could properly be handled by merely soaking it in Epsom Salts, isn't that true?

A. Yes."

Asked about the use of penicillin or sulfa drugs, Dr. Mensor replied (Tr. p. 95): "I would say if it had been available they certainly should have been used, yes." He stated that if penicillin was not available, sulfa should have been used, if available.

Dr. Cox also testified that the symptoms indicate a cause for major concern, indicating the vital need of expert medical care and for a course of penicillin treatment. (Tr. p. 69.)

A virulent infection is best treated by complete immobilization and the administration of antibiotics such as penicillin, streptomycin, or sulfanilimide, and sometimes they are given in combination. (Tr. pp. 61, 66, 95.) Ichthymol ointment should not have been used. (Dr. Cox, Tr. p. 67.)

THE SHIP'S MEDICINE CHEST WAS INSUFFICIENT.

Title 46, U. S. C. A., sec. 666, is a statute enacted to promote the health and safety of seamen. It provides:

> "Every vessel belonging to a citizen of the United States, bound from a port of the United States to any foreign port * * * shall be provided with a chest of medicines."

This, of course, means that an adequate supply of medicines shall be provided and maintained. There was ample testimony that penicillin and sulfa drugs were normally included in the medical supplies of tankers at the time in question.

> "The onus probandi in respect to the sufficiency of the medicine chest lies on the owner."

See

The Nimrod, Fed. Cas. No. 10,207;
Harden v. Gordon, 11 Fed. Cas. No. 6047.

And it is held that the violation of a safety statute such as this constitutes negligence as a matter of law, and that it is not necessary specifically to plead the violation of the statute. See *Booker v. Alaska Steamship Co.,* 1936 A.M.C. 153 (dealing with a violation of 46 U. S. C. A., sec. 669, clothing and heat, which is in the same group of statutory provisions as the above, relating to medicine chest).

QUESTION OF ADEQUACY OF MEDICINE CHEST WAS LITIGATED WITHOUT OBJECTION, AND MATTER IS NOT COVERED BY ASSIGNMENTS OF ERROR.

Appellant, at pages 11-13 of its brief, complains of the alleged failure of the libel to allege the inadequacy of the medicine chest and asserts that appellant had no opportunity to rebut libelant's testimony on this subject.

The libel alleges generally the negligent failure to supply libelant with proper medical care and medica-

tion. The evidence was presented without objection and the issue fully litigated. No request for a continuance or other motion was made either at the trial or thereafter. There is no assignment of error on the point. Nor is there even a statement that any more or different evidence could be produced.

The cited case of *Welch v. Fallon,* 181 Fed. 875, involves different facts and pleadings, and is merely an opinion of the District Court stating his reasons for refusing to consider an issue which he concluded was not pleaded. Presumably a proper objection had been made, but in any event it furnishes no authority for raising the question for the first time on appeal.

THE MASTER NEGLIGENTLY FAILED TO CONTACT OTHER SHIPS TO REPLENISH THE MEDICINE CHEST.

The Court below found, on undisputed testimony, that "The respondent negligently failed to replenish the medicine chest at ports of call, or by contacting other vessels. That the vessel was traversing a busy trade route and could and should have contacted other vessels in the vicinity. That respondent negligently failed to administer the appropriate medicines, to-wit, penicillin and sulfa drugs, if in fact there were any on board the ship. * * * That libelant's condition was the proximate result of improper and inadequate medical care, as aforesaid."

This finding is not covered by any assignment of error, and is not mentioned in Appellant's brief. Appellant prefers to argue the inconvenience of putting

into port, and ignores the evidence supporting the above finding. The decree should be sustained on this ground alone.

CLAVEL SHOULD HAVE BEEN PLACED ASHORE AT MANILA.

With customary disregard for the facts, Appellant states that on the day Clavel's finger was lanced the Captain "did not consider its condition serious enough to divert the ship as the vessel was then only four days from its destination in Japan." (Brief p. 6.) It is stated that on *April 28* the Pecos "was 260 miles northwest of Manila; this was the closest point it got to a port before arrival in Japan." (Brief p. 6.)

As a matter of fact, it appears from the medical log of the ship that the finger was drained and dressed on April 27, 1948. (Tr. p. 139.) The vessel arrived at Yokosuka on May 3, 1948, and Clavel was not taken to the hospital until May 4, 1948. (Tr. p. 140.)

It was therefore 7 or 8 days after the hand was lanced before Clavel reached the hospital, depending on whether April 27 is included in the calculation.

It further appears from Captain Johnson's testimony (Lib. Ex. 1-B, p. 27) that it was on *April 27, 1948,* when the ship was nearest to Manila. The vessel made better than 300 miles a day, and it can readily be seen that it was not too much of a hardship for the ship to deviate to Manila. However, that would not have been necessary, as the ship was on a busy route and it would have been possible to contact other ships for medicines or attention of a ship's doctor. (Tr. p. 151.) The Court found, from all the testi-

mony, that the respondent should have done one of these things, and its finding is conclusive.

MASTER NEGLIGENTLY FAILED TO RADIO FOR ADVICE AND TO USE AVAILABLE MEDICINE.

Enough has been said to show that Clavel's request that the Master of the vessel radio for medical advice should have been granted. Furthermore, the second mate of the vessel testified that although the ship had run out of penicillin at the time of Clavel's injury he believed they still had sulfa. (Tr. p. 132.) Why, then, was it not given? Although inferior to penicillin, the failure to use it warranted the District Court's finding of negligence on that ground.

AUTHORITIES ON DUTY TO PROVIDE MEDICAL CARE.

There is no occasion to comment on the authorities cited by Appellant on the general subject of the duty of the shipowner to furnish medical care, and to deviate if necessary to obtain it. It is, as has so often been stated, a question of the particular facts involved. We add to the citations the case of *De Zon v. American President Lines,* 318 U.S. at 667, 87 L. ed. at 1071:

> "The duty to provide proper medical treatment and attendance for seamen falling ill or suffering injury in the service of the ship has been imposed upon the shipowners by all maritime nations. The Iroquois, 194 U.S. 240-242, 48 L.ed. 955-957, 24 S. Ct. 640. When the seaman becomes

committed to the service of the ship the maritime law annexes a duty that no private agreement is competent to abrogate, and the ship is committed to the maintenance and cure of the seamen for illness or injury during the period of the voyage, and in some cases for a period thereafter. This duty does not depend upon fault. It is no merely formal obligation and it admits of no merely perfunctory discharge. Its measure depends upon the circumstances of each case * * * the seriousness of the injury or illness and the availability of aid. Although there may be no duty to the seaman to carry a physician, the circumstances may be such as to require reasonable measures to get him to one, as by turning back, putting in to the nearest port although not one of call, hailing a passing ship, or taking other measures of considerable cost in time and money. Failure to furnish such care, even at the cost of a week's delay, has been held by this Court to be a basis for damages."

See *Wittekoppe v. N. Y. etc. Co.,* 189 Fed. 920:

"The libelant * * * claims that he asked, and expected, to be put ashore at Pernambuco. The officers deny this, and it may be that he said nothing, or that the officers did not understand him. But I do not think in such a case the shipowner is exonerated even if the seaman acquiesced in not obtaining proper surgical treatment. It is the duty of the master in such a case to use his own judgment and to do what is necessary under the circumstances, and I think in this case the master was bound to know that he, with the best intentions, was not competent to so treat the broken wrist as to prevent the result which occurred."

See, also, 56 Corpus Juris at 1073, listing many cases where the problem of deviation to obtain medical care for an injured seaman was considered.

> "Where the welfare of the seaman requires it, and the circumstances of the ship permit, the master should deviate from the voyage, and put into port or hail a passing ship in order to secure proper care for a disabled seaman."

CONCLUSION.

Appellee therefore submits that the appeal should be dismissed, (1) because no errors have been assigned, (2) because some grounds of negligence found by the trial Court, which alone sustain the judgment, have not even been mentioned or discussed by Appellant, and (3) because each of the trial Court's findings and the decree entered thereon are amply supported by evidence, and no other decree could properly be entered. Appellant has been compelled to distort and misstate the evidence and issues in order to give any appearance of substance to its appeal and it ignores much of the testimony presented by the libelant below. Even by so doing it has not overcome the well-established presumption in favor of the trial Court in admiralty. The decree appealed from should be affirmed.

Dated, San Francisco, California,
March 2, 1951.

Respectfully submitted,
L. CHAS. GAY,
Proctor for Appellee.